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No. 89-964

Supreme Court, U.S.
FILED
JUN 20 1990
JOSEPH F. SPANIOL, JR.
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In the Supreme Court of the United States

OCTOBER TERM, 1989

RAYMOND J. MOSKAL, SR., PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether 18 U.S.C. 2314, which prohibits the interstate transportation of instruments that are "falsely made," applies to the transportation of valid automobile certificates of title that contain false mileage information.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 3a-8a) is reported at 888 F.2d 283.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a-2a) was entered on October 18, 1989. The petition for a writ of certiorari was filed on December 16, 1989, and granted on March 19, 1990. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Middle District of Pennsylvania, petitioner was convicted on two counts of interstate

transportation of falsely made securities, 18 U.S.C. 2314, two counts of uttering counterfeit state securities, 18 U.S.C. 513, and conspiracy to violate those statutes, 18 U.S.C. 371.[1] He was sentenced to six months' imprisonment on the conspiracy count. On the remaining counts, he received concurrent terms of two years' imprisonment, but those sentences were suspended in favor of three years' probation. The court of appeals affirmed. Pet. App. 3a-8a.[2]

1. The evidence at trial showed that between December 1984 and July 1985 petitioner engaged in an automobile "title washing" scheme, the purpose of which was to obtain Virginia automobile titles bearing false, low-mileage figures. Petitioner was the office manager for co-defendant Alvin Davis, Jr., who owned a wholesale auto dealership in Manheim, Pennsylvania. Pet. App. 5a. Co-defendant Dennis Smith and co-conspirator Curman "Buddy" Dickens owned and operated Buddy's Auto Sales, a wholesale auto dealership in Virginia.

The scheme operated as follows: Persons working with Davis would purchase used cars with high mileage for resale to the public. The odometers on those cars would be "rolled back" to reflect much lower mileage figures. Davis's associates would then alter the titles to the cars, to accord with the rolled back odometer readings. Packages of the altered certifi-

[1] Co-defendants Alvin Davis, Jr., and Dennis Smith were tried and convicted with petitioner. The court of appeals affirmed their convictions in the same opinion that disposed of petitioner's claims.

[2] The judges of the Third Circuit all recused themselves from hearing this case. As a result, the Chief Justice appointed three judges from the Second Circuit to sit by designation in the Third Circuit. See Pet. App. 5.

cates of title would be sent from Davis's dealership in Pennsylvania to Buddy's Auto Sales in Virginia. Dickens and his wife would then use the altered titles to apply for Virginia title certificates for the cars in the name of their dealership. Pet. App. 5a-6a. The Virginia titles would contain the lower odometer readings. The falsity of the odometer readings could not be detected from the Virginia titles, because the lower odometer readings on the titles had been entered by the Virginia state agency based on the altered titles sent from Pennsylvania. After obtaining the new titles, Dickens and Smith would send them to the dealership in Pennsylvania, charging a fee of $100 per title for their services. Pet. App. 6a. Petitioner, who participated in sending the old, altered titles to Virginia, would receive the new, "washed" titles for the dealership. See Pet. 6. Davis would then distribute the new Virginia titles to dealers who had provided the original titles to him, charging them a fee for his title-washing service. Ultimately, the dealers sold the vehicles with rolled-back odometers and washed titles to unsuspecting customers. Pet. App. 6a.

2. The indictment charged that petitioner transported two washed Virginia titles in interstate commerce in violation of 18 U.S.C. 2314, which prohibits the intentional transportation in interstate commerce of any "falsely made, forged, altered, or counterfeited securities." J.A. 11-13. In his defense, petitioner argued that the prohibition in 18 U.S.C. 2314 against transporting a "falsely made" security applies only to documents that are not themselves genuine, *i.e.*, documents that are not what they purport to be. He conceded that the washed titles might have contained false information, but he argued that because the titles themselves were "genuine," *i.e.*,

they were issued by the appropriate Virginia officials and were not altered thereafter, he could not be convicted under Section 2314. The trial court rejected that claim, and petitioner was found guilty.

3. The court of appeals affirmed. Pet. App. 3a-8a. It noted that the Tenth Circuit had held that the term "falsely made" relates to the genuineness of the document, not the falsity of its contents. See *United States* v. *Sparrow*, 635 F.2d 794 (1980) (en banc), cert. denied, 450 U.S. 1004 (1981). The court, however, chose to follow more recent cases holding to the contrary. The stated mileage figure, the court explained, is a material part of a title certificate. The fact that valid title may be transferred by the certificate "does not vitiate the fraud that is foisted on the unsuspecting customer when the falsely made document is introduced into commerce." Pet. App. 7. In light of the purpose of Section 2314 to prevent fraudulent documents from being circulated interstate, the court adopted the majority view that the term "falsely made" in Section 2314 is not limited to counterfeited, forged, or altered documents, but includes documents into which false information was inserted when they were made. Pet. App. 7a.[3]

SUMMARY OF ARGUMENT

A. Section 2314 prohibits the intentional interstate transportation of any security that is "falsely made," without regard to the method used to make the security false. The statute does not define or in any way limit the meaning of "falsely made." There is therefore no textual basis on which to premise a

[3] The court also rejected petitioner's attack on his Section 513 convictions. Pet. App. 7a-8a. Petitioner does not here challenge his convictions on these counts.

construction limiting the statute based on the method by which a false document is produced.

Moreover, the term "falsely made" would be superfluous if it referred solely to documents that were false in their execution as opposed to their content. Section 2314 already prohibits the transportation of "forged, altered, or counterfeited" securities. If "falsely made" is to have an independent function, it must reach the falsity effected when false information is inserted into a genuine document at the time it is made.

The straightforward reading of "falsely made" indicated by the statutory language promotes the purposes of Section 2314. That Section was designed to prevent frauds made possible or made easier by using interstate transportation. The fraud perpetrated in this case is exactly the kind of fraud that Section 2314 was designed to combat. Titles are "washed" out-of-state because the lack of uniformity in state titling requirements makes fraudulent information harder to detect and trace. In addition, titles can be "washed" in those States with the most manipulable titling procedures. The fraudulent documents produced by exploiting those differences in state practice are at least as dangerous as those more simply produced by forging or altering documents. It would be incongruous to conclude that the broad anti-fraud policies of Section 2314 reach only the latter two categories.

B. Although the term "falsely made" was given a restrictive interpretation by many common law courts, such a construction is not warranted here. As this Court has noted, Congress cannot be presumed to have intended to attach an arcane or antiquated common law meaning to a term when that meaning would be inconsistent with Congress's intent.

The predominant view among American common law ~~courts~~ was that the terms "falsely made" and "forged" were synonymous. There is, however, no indication that in 1939 or afterwards Congress recognized or meant to adopt the predominant common law view. To the contrary, Congress's actions during recodification of the Criminal Code in 1948 and its amendment of the National Stolen Property Act in 1984 indicate that it has long held a broader view of the term "falsely made."

In 1948, Congress reenacted and recodified Section 2314, as part of a recodification of the Criminal Code. Act of June 25, 1948, ch. 645, § 1, 62 Stat. 806. At the same time, it restructured another provision, Section 29 of the Criminal Code of 1909 (at that time recodified as 18 U.S.C. 73 (1946)), the pertinent language of which was the same as that in Section 2314 (concerning objects "falsely made, forged, altered, or counterfeited"). The manner in which Congress restructured Section 29 demonstrated that it understood "falsely made" to mean false in execution or content. A particular clause of Section 29 had been previously interpreted by this Court in *United States* v. *Davis*, 231 U.S. 183 (1913) to refer to both types of falsity; Congress in 1948 specifically linked that clause to the part of Section 29 that dealt with "falsely made" documents. Because it is clear that Congress did not intend in 1948 to narrow the substantive reach of Section 29, it is evident that the Congress that reenacted both Section 29 and Section 2314 assumed that the phrase "falsely made" was not limited to documents that are forged, altered, or counterfeited.

In 1984, Congress provided an even more unambiguous indication that it did not understand the term "falsely made" to carry a restrictive meaning.

That year, Congress amended the definition of "securities" for purposes of Section 2314 to include "[any] valid or blank motor vehicle title." Motor Vehicle Theft Law Enforcement Act of 1984, Pub. L. No. 98-547, § 202, 98 Stat. 2770. Since "counterfeited" or "altered" titles cannot be valid, Congress's action indicates that it regarded the term "falsely made" to include genuine documents into which false information had been inserted.

The legislative history of the 1984 amendment confirms this view: It demonstrates that Congress was concerned with "title washing" schemes similar to the one here. To give the term "falsely made" a narrow interpretation would defeat the purpose of the 1984 amendment. Thus, it is evident that the term "falsely made" in Section 2314 applies to documents such as the automobile titles in this case, which were produced by officials duped by false information.

ARGUMENT

AN AUTOMOBILE TITLE IS "FALSELY MADE" WITHIN THE MEANING OF SECTION 2314 IF FALSE INFORMATION WAS INSERTED INTO IT AT THE TIME OF ITS MAKING

A. The Language And Purposes Of Section 2314 Indicate That It Applies To All False Documents, Regardless of the Method Used To Make The Documents False

Section 2314 punishes the knowing transportation of any security that is "falsely made," as well as any security that is "forged, altered, or counterfeited." Petitioner was charged with transporting genuine Virginia automobile titles, which contained false odometer readings that petitioner and his co-conspirators had fraudulently induced the Commonwealth of Virginia to include on the title forms. Petitioner argues that the term "falsely made" does not apply

to the "genuine" Virginia titles, even though the falsehood in the title forms was procured by fraud, and even though the difference between the "genuine" Virginia title documents and forged or altered title documents is simply that the defendants induced the Virginia authorities to introduce the false material into the title forms rather than doing it themselves.

We submit that for two reasons the term "falsely made" applies to the Virginia automobile titles at issue in this case. First, the addition of the term "falsely made" to the other categories of covered securities suggests that Congress did not mean to limit the statute to "nongenuine" documents, *i.e.*, documents that are forged, altered, or counterfeited. Second, petitioner's restrictive interpretation of the term "falsely made" would be inconsistent with the broad antifraud purposes of Section 2314; with respect to their capacity to promote fraud, there is no sensible basis on which to distinguish between nongenuine (*i.e.*, false, altered, or counterfeited) documents and documents that are "genuine," but contain material falsehoods.

1. The term "falsely made" is general in nature. It is not defined in the statute, and there is no indication that the term was meant to be used restrictively. Nothing in the term itself, or anything else in the statute, suggests a distinction between a document that is "falsely made" because it was printed on an unauthorized press and one that is "falsely made" because it contained false representations when it was created. Rather, the generality of the term indicates that "[its] purpose [is to] * * * prohibit the fraudulent introduction into commerce of falsely made documents regardless of the precise method by which the introducer or his confederates

effected their lack of authenticity." *United States* v. *Huntley*, 535 F.2d 1400, 1402 (5th Cir. 1976), cert. denied, 430 U.S. 929 (1977); see also *United States* v. *Daly*, 716 F.2d 1499, 1509 (9th Cir. 1983); *United States* v. *Mitchell*, 588 F.2d 481, 484 (5th Cir.), cert. denied, 442 U.S. 940 (1979).

The same conclusion is suggested by the principle that a court must "give effect, if possible, to every clause and word of a statute." *United States* v. *Menasche*, 348 U.S. 528, 538-539 (1955); see, *e.g.*, *Pennsylvania Dep't of Public Welfare* v. *Davenport*, No. 89-156 (May 29, 1990), slip op. 8. Petitioner contends that "falsely made" (Pet. Br. 15-16) is synonymous with "forged"—another in the list of terms Congress used to describe the kinds of documents covered by Section 2314. In petitioner's view, both modifiers identify documents that are false in their execution, as opposed to false in their content. But if that is so, the term "falsely made" is mere surplusage. To give the term "falsely made" an independent function in the statute, it is necessary to construe it to reach falsity effected by a means other than forgery, altering, or counterfeiting. That means the term must apply to falsity effected by the insertion of false information in the process leading to the creation of a genuine document.

Most courts of appeals that have considered the issue have rejected petitioner's narrow reading of "falsely made."[4] In the context of automobile title

[4] The Fourth, Fifth, Sixth, and Ninth Circuits have agreed with the Third Circuit's construction of the term "falsely made." See, *e.g.*, *United States* v. *Cotoia*, 785 F.2d 497, 501-502 (4th Cir. 1986); *United States* v. *Daly*, 716 F.2d at 1507-1509; *United States* v. *Mitchell*, 588 F.2d at 484; *United States* v. *Tucker*, 473 F.2d 1290, 1293-1294 (6th Cir.), cert. denied, 412 U.S. 942 (1973); *United States* v. *Huntley*, 535

frauds, in particular, most courts have held that Congress added the words "falsely made" to broaden the statute's compass beyond forgery to include the "false makings" that are effected when motor vehicle titles are procured on the basis on false information. *United States* v. *Daly*, 716 F.2d at 1507-1509; *United States* v. *Cotoia*, 785 F.2d 497, 501-502 (4th Cir. 1986); *United States* v. *Kauffman*, 670 F. Supp. 134, 136 (M.D. Pa. 1985), aff'd, 782 F.2d 1032 (3d Cir. 1985). Contra *United States* v. *Sparrow*, 635 F.2d 794 (10th Cir. 1980) (en banc), cert. denied, 450 U.S. 1004 (1981). The courts in the majority have recognized, as has this Court, that

> [a] genuine instrument containing a false statement of facts, used in support of a claim, the party knowing it to be false, and using it with the intent to defraud, presents a case not distinguishable in principle, or in turpitude, or in its mischievous effects, from one in which every part of the instrument is fabricated; and when the one is as fully within the words of the statute as the other, we may well suppose that it was intended to embrace it

United States v. *Staats*, 49 U.S. (8 How.) 41, 47 (1850).

2. In addition its consistency with the statutory language, the court of appeals' construction of

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F.2d at 1402. The Tenth Circuit has decided to the contrary in *United States* v. *Sparrow*, 635 F.2d 794 (1980) (en banc), cert. denied, 450 U.S. 1004 (1981). Older decisions in the Second, Seventh, and Eighth Circuits agreed with the view later taken by the Tenth Circuit in the *Sparrow* case. See *Melvin* v. *United States*, 316 F.2d 647, 648 (7th Cir. 1963); *United States* v. *Brown*, 246 F.2d 541, 542 (2d Cir. 1957); *Martyn* v. *United States*, 176 F.2d 609, 610 (8th Cir. 1949).

"falsely made" accords with the purposes of Section 2314. The provision that is now Section 2314 was first enacted as part of the National Stolen Property Act (NSPA) of 1934, ch. 333, § 3, 48 Stat. 794-795. The language at issue in this case was added as an amendment in 1939 in order to "widen[] the scope" of the Act, expanding its prohibitions against the interstate transportation of stolen goods to include trafficking in securities that had been "falsely made, forged, altered, or counterfeited." Act of Aug. 3, 1939, ch. 413, § 1, 53 Stat. 1178.[5]

Specifically, Section 2314 as amended was designed to prevent frauds perpetrated or made easier by using interstate transportation. *United States* v. *Sheridan*, 329 U.S. 379, 383-384 (1946). In addition, Congress intended to aid the States in detecting and punishing those who committed crimes under state law but used channels of interstate commerce to evade identification and prosecution. *Ibid.*; see also *McElroy* v. *United States*, 455 U.S. 642, 654-655 & n.19 (1982) (noting that federal authority was necessary to investigate certain crimes and to compel witnesses to testify).[6]

The fraud perpetrated here is precisely the type that is facilitated by interstate transportation. Ti-

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[5] The 1939 Act also added a prohibition against the transportation of embezzled goods, securities, and money. See ch. 413, § 1, 53 Stat. 1178.

[6] Although the main purposes of the 1939 amendment are clear, the legislative history of the provision is scanty. The brief references in the legislative history to the scope of the new prohibition focused mainly on counterfeited securities. See H.R. Rep. No. 422, 76th Cong., 1st Sess. 3 (1939) (incorporating letter of Attorney General); S. Rep. No. 674, 76th Cong., 1st Sess. 1-2 (1939).

tles are washed out-of-state because States do not have uniform titling requirements or procedures.[7] Those running a title washing scheme can choose the States with the most manipulable procedures. Furthermore, when title is transferred between States, there is little chance that inconsistency in the information required on title applications will be traced.[8] And, even when state officials detect title washing schemes, it is difficult to investigate and take steps against out-of-state participants.

It would be inconsistent with the anti-fraud purposes of Section 2314 for liability to turn on what

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[7] In 1986, Congress amended the Motor Vehicle Information and Cost Savings Act (1972), Pub. L. No. 92-513, 86 Stat. 947, to provide that certain information uniformly be required in registering title of motor vehicles. Truth in Mileage Act of 1986, Pub. L. No. 99-579, 100 Stat. 3309. At that time, six States did not require that mileage information be included on state titles; other States did not provide space on the title for odometer readings upon reassignment of title; still other States did not enforce existing requirements that mileage be disclosed. See S. Rep. No. 47, 99th Cong., 1st Sess. 1-2 (1985).

[8] In hearings on legislation to strenthen automobile anti-theft measures in a number of statutes, including the National Stolen Property Act, Congress in 1980 reviewed testimony detailing the problems created by disparate and variously enforced state titling programs. *Motor Vehicle Theft Prevention Act: Joint Hearings on H.R. 4178 Before the House Comm. on Interstate and Foreign Commerce and the House Comm. on Foreign Affairs*, 96th Cong., 2d Sess. (1980). According to material submitted by the U.S. Department of Transportation, weaknesses in state titling systems stem from the absence of review procedures designed to detect counterfeiting or alteration, the lack of familiarity by state personnel with foreign state title documents, and the failure by States to require verification of foreign title validity. *Id.* at 316, 317-318.

amounts to the timing of the introduction of falsehoods into the creation of a document used to promote fraud. Consider the status of three fraudulent documents: (1) an entirely bogus document that contains false information; (2) a genuine document that was altered after its making to add the same false information; and (3) a genuine document in which the false information was incorporated during the process of making the document. All three documents have similar capacity for mischief. Indeed, documents of each type could have been used interchangeably in the very fraud at issue in this case. If anything, the third type of document—the type that would be excluded from Section 2314 under petitioner's construction—is more dangerous than the other two because the falsehood, which is incorporated into a genuine document, is more difficult to detect. In light of the objectives Section 2314 was meant to serve, it would make no sense to include the first two categories of documents, but not the third. As the court of appeals put the point in *United States* v. *Daly*, 716 F.2d at 1509, it would be incongruous to conclude that Congress intended to exempt from the scope of Section 2314 "clever schemes" such as washing motor vehicle titles, in which the schemes succeed by "induc[ing] state participation in the creation of fraudulent documents." Thus, the broader interpretation of Section 2314 "accord[s] with the statutory purpose of making guilt or innocence turn upon whether the actor wrongfully intended to place into commerce a falsely made document instead of focusing upon the precise method by which its lack of authenticity was effected." *United States* v. *Tucker*, 473 F.2d 1290, 1294 (6th Cir. 1973).

B. Although Most Common Law Courts Assumed That The Term "Falsely Made" Referred To Forgery, Congress Evidently Adopted The Competing Position That "Falsely Made" Applies To Documents That Were False When Made

When Congress uses a well-known common law term without defining it, it is generally presumed, in the absence of contrary indications, that Congress intended to adopt the common law meaning of the term. *Bell* v. *United States*, 462 U.S. 356, 360 (1983); *United States* v. *Turley*, 352 U.S. 407, 411 (1957); *Gilbert* v. *United States*, 370 U.S. 650, 655 (1962). That proposition, however, is simply an application of the more general principle that Congress ordinarily intends undefined terms to have their conventional meaning. See *Morissette* v. *United States*, 342 U.S. 246, 263 (1952) ("where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, * * * absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them").

Where the common law definition of a term accords with the conventional understanding of the term, that definition is naturally presumed to be the one Congress intended. But the common law definition does not ordinarily apply where "the present common understanding of the word departs largely from the technical meaning it had at the old common law." *Reagan* v. *United States*, 157 U.S. 301, 302 (1895) (refusing to adopt the common law definition of the term "felony"). Thus, even where a term had a clear common law meaning, the Court has applied the "ordinary, contemporary, common meaning" of the term in preference to an antiquated formulation from early common law. See *Perrin* v.

United States, 444 U.S. 37, 42 (1979) ("bribery" under the Travel Act, 18 U.S.C. 1952, is not confined to the common law definition); *United States* v. *Nardello*, 393 U.S. 286, 292-293 (1969) ("extortion" under the Travel Act is defined according to its contemporary understanding, not according to the restrictive common law definition). In concluding that the offense proscribed in 18 U.S.C. 2113(b) is not limited to common law larceny, the Court stated:

> We cannot believe that Congress wished to limit the scope of the amended Act's coverage, and thus limit its remedial purpose, on the basis of an arcane and artificial distinction more suited to the social conditions of 18th-century England than the needs of 20th-century America.

Bell v. *United States*, 462 U.S. 356, 362 (1983). More recently, the Court declined to interpret the term "burglary" in a modern statute according to its common law meaning; to the contrary, the Court applied the rule that a statutory term should not be given its common law meaning "when that meaning is obsolete or inconsistent with the statute's purpose." *Taylor* v. *United States*, No. 88-7194 (May 29, 1990), slip op. 18. Likewise, the Court has weighed heavily indications in the legislative history that Congress intended to depart from the common law usage. *Bell*, 462 U.S. at 361-362; *Perrin*, 444 U.S. at 45-49.

The restrictive common law understanding of the term "falsely made" should not be applied to Section 2314, because it would be inconsistent with the purposes of the statute, as we have shown above. In addition, the available evidence indicates that Congress intended the term "falsely made" in Section 2314 to have a broader reach than most common law courts had given it.

We recognize that the predominant view among American common law courts was that the terms "falsely made" and "forged" were synonymous.[9] The courts that took that view most frequently reasoned from the definition of forgery by legal authorities as a "false" or "fraudulent making"; they then equated that proposition with its converse—that a document that was "falsely made" had to be forged in a narrow sense. See, *e.g.*, *United States* v. *Wentworth*, 11 F. 52, 55 (C.C.D.N.H. 1882) ("It is the '*false making*' which the statute makes an offence, and this is forgery as described in all the elementary books."). In turn, the courts determined that "[f]orgery cannot be committed by the making of a genuine instrument, though the statements made therein are untrue. The words 'whoever falsely makes' generally apply to the false making of the writing as distinguished from the contents of the instrument itself." *Goucher* v. *State*, 113 Neb. 352, 355, 204 N.W. 967, 968 (1925) (citations omitted).

While most courts treated the term "falsely made" as equivalent to "forged" in the narrow sense," that view was not universally followed in this country. A

[9] See, *e.g.*, *Goucher* v. *State*, 113 Neb. 352, 354-355, 204 N.W. 967, 968 (1925); *State* v. *Ford*, 89 Or. 121, 172 P. 802 (1918); *People* v. *Bendit*, 111 Cal. 274, 43 P. 901 (1896); *State* v. *Corfield*, 46 Kan. 207, 26 P. 498 (1890); *State* v. *Young*, 46 N.H. 266 (1865).

Cases interpreting the same phrase in federal statutes generally adopted the same approach. See *United States ex rel. Starr* v. *Mulligan*, 59 F.2d 200 (2d Cir. 1932); *United States* v. *Wentworth*, 11 F. 52 (C.C.D.N.H. 1882); *United States* v. *Corbin*, 11 F. 238 (C.C.D.N.H. 1882); *United States* v. *Smith*, 262 F. 191 (D. Ind. 1920); *United States* v. *Glasener*, 81 F. 566 (S.D. Cal. 1897); *United States* v. *Moore*, 60 F. 738 (N.D.N.Y. 1894); *United States* v. *Cameron*, 3 Dak. 132, 13 N.W. 561 (1882).

number of courts reasoned that a defendant could be guilty of falsely making a validly executed document, "in case it be false in any material part, and calculated to induce another to give credit to it as genuine and authentic." *Luttrell* v. *State*, 85 Tenn. 232, 237, 1 S.W. 886, 888 (1886).[10] And in England, a significant line of authority accorded with the minority American position.[11]

[10] See, *e.g.*, *United States* v. *Hartman*, 65 F. 490 (E.D. Mo. 1894); *Ex parte Hibbs*, 26 F. 421 (D. Ore. 1886); *Commonwealth* v. *Wilson*, 89 Ky. 157, 12 S.W. 264 (1889); *Moore* v. *Commonwealth*, 92 Ky. 630, 18 S.W. 833 (1892); *Luttrell* v. *State*, 85 Tenn. 232, 1 S.W. 886 (1886). For a comparison of the common law approaches, see Annotation, *Genuine Making of Instrument for Purpose of Defrauding as Constituting Forgery*, 41 A.L.R. 229 (1926); see also 37 C.J.S. *Forgery* §§ 5, 11 (1943 & Supp. 1989).

In fact, even assuming the equivalence of "false making" and "forgery" did not end the inquiry for a number of courts, since "forgery" itself can include procuring a genuine signature by ruse, or sleight of hand. As the court noted in *State* v. *Shurtliff*, 18 Me. 368, 371 (1841), where the defendant had switched deeds unbeknownst to a seller:

> The whole was done by the hand, or by the procurement of the defendant. It does not lessen the turpitude of the offence, that the party whom he sought to defraud was made in part his involuntary agent, in effecting his purpose. * * * In truth the signature to that false instrument, in a moral and legal point of view, is as much imputable to him, as if he had done it with his own hand.

See *In re Count de Toulouse Lautrec*, 102 F. 878 (7th Cir. 1900); *People* v. *Nesseth*, 127 Cal. App. 2d 712, 274 P.2d 479 (1954); *Warren* v. *State*, 247 Ala. 595, 25 So. 2d 698 (1946); *Biddeford Nat'l Bank* v. *Hill*, 102 Me. 346, 66 A. 721 (1907).

[11] See *Reg.* v. *Ritson*, 11 Cox's Crim. Law Cas. 352 (1869); 1 Hale P.C. ch. 64, at 683 (1847); 1 Hawk. P.C. ch. 70,

This Court has adverted to the majority interpretation of "false making" on two occasions, although both times without examining or ruling on the point. See *United States* v. *Staats*, *supra*, and *United States* v. *Davis*, 231 U.S. 183 (1913). Both cases concerned prosecutions for the making and use of false affidavits with intent to defraud the United States, in violation of predecessors of 18 U.S.C. 495.[12] The first clause of the statute at issue in *Davis* made criminally liable any person who "falsely makes, alters, forges, or counterfeits; or causes or procures to be falsely made, altered, forged, or counterfeited * * * any deed, power of attorney, order, certificate, receipt, or other writing" for the purpose of defrauding the government. The third clause of the statute applied to any person who transmitted or presented to any federal office or officer, "any deed, power of attorney, order, certificate, receipt, or other writing * * * [in support of a fraudulent claim], knowing the same to be false, altered, forged, or counterfeited." *Davis*, 231 U.S. at 187 n.1 (quoting Rev. Stat. § 5421). In both *Staats* and *Davis*, this Court found the prosecutions proper under the third clause of the statute. The Court assumed, without the need to decide, that the same prosecutions would have been improper under the first clause.[13]

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at 336 (6th ed. 1777); see also 2 J. Bishop, *Criminal Law* § 584 (9th ed. 1923) (quoting Coke).

[12] The statute at issue in the *Staats* case was Section 1 of the Act of Mar. 3, 1823, ch. 38, § 1, 3 Stat. 771-772. The statute at issue in the *Davis* case was a direct successor statute, Section 5421 of the Revised Statutes, which was codified as Section 29 of the Criminal Code of 1909, ch. 321, 35 Stat. 1094.

[13] The prosecution in *Staats* was brought only under the third clause of the statute. In *Davis*, the government did not contest the decision of the lower court that the first clause of Rev. Stat. § 5421 embraced only those documents that were forged or counterfeited, conceding the point without explanation.

There is no indication that, in 1939 or afterwards, Congress was aware of or intended to incorporate into Section 2314 the majority common law construction of the term "falsely made." Other than the broad purpose that the National Stolen Property Act was intended to serve, there is nothing in the legislative history of the 1939 amendment to the Act that is at all instructive on the question whether Congress intended to adopt the narrow common law meaning of the term "falsely made" or intended the term to have a broader meaning. Some enlightenment can be obtained, however, from Congress's action on a similar statute several years later.

In 1948, Congress reenacted and recodified Section 2314, as part of a recodification of the Criminal Code. Act of June 25, 1948, ch. 645, § 1, 62 Stat. 806. At the same time, Congress restructured a provision containing the same language as Section 2314 (concerning objects "falsely made, forged, altered, or counterfeited") in a manner demonstrating that Congress equated "falsely made" with "false" either in execution or in content.

Congress's action concerned Section 29 of the Criminal Code of 1909, ch. 321, 35 Stat. 1094 (recodified as 18 U.S.C. 73 (1946)), formerly Section 5421 of the Revised Statutes, the provision that had been interpreted by this Court in *Davis*. In that case, as noted above, the Court assumed without analysis that the term "falsely made" referred to forged instruments "in a technical sense." *Davis*, 231 U.S. at 189. By contrast, the

Court determined that a subsequent clause of the statute referred more broadly to "any and all fraudulent documents" when it spoke of "any * * * writing [presented by a person] * * * knowing the same to be false, altered, forged, or counterfeited" *Id.* at 188.

The Court's parsing of the statute depended on the fact that the third clause of the statute contained no specific reference linking the "false" writings it concerned to the "falsely made" writing identified in the first clause. By contrast, the Court classified a second clause in the statute, which contained the same language used in the third clause but included a specific reference to the falsely made writings of the first clause, as referring only to forged (and counterfeited) documents.[14] See *Davis*, 231 U.S. at 188. As the Court noted in *Staats*, upon which *Davis* relied (see 231 U.S. at 189):

[14] Rev. Stat. § 5421 (1878 ed.) provided in relevant part (emphasis added):

> Every person who falsely makes, alters, forges, or counterfeits; or causes or procures to be falsely made, altered, forged, or counterfeited[,] * * * any deed, power of attorney * * * or other writing, for the purpose of obtaining * * * from the United States * * * any sum of money;
>
> or who utters or publishes as true, or causes to be uttered or published as true, any *such* false, forged, altered, or counterfeited deed, power of attorney, * * * or other writing, knowing the same to be false, altered, forged, or counterfeited;
>
> or who transmits to, or presents at, or causes or procures to be transmitted to, or presented at, any * * * [federal officer or office], *any* deed, power of attorney, * * * or other writing, in support of, or in relation to, any account or claim, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited, shall * * * [be guilty of a crime].

> The deeds and other writings mentioned [in the third clause] are not connected with those in the preceding paragraph, as would have been natural, and almost of course, if intended to describe similar instruments. The language is "any deed, power of attorney," &c.; not, the aforesaid deed, which words must be in effect interpolated, * * * [if they are to refer to the forged instruments identified in the first clause].

Staats, 49 U.S. (8 How.) at 47.

It was thus well established by 1913 that submitting affidavits that were false in content, as well as those that were false because forged, to the federal government with intent to defraud constituted an offense under the third provision of Rev. Stat. § 5421. See *Davis*, 231 U.S. at 188.

Against this background, Congress in 1948 revised and recodified the Criminal Code. As this Court has long recognized, "the function of the Revisers of the 1948 Code was generally limited to that of consolidation and codification." *Muniz* v. *Hoffman*, 422 U.S. 454, 474 (1975). Absent a "clearly expressed" indication to the contrary, no change in substantive law can be presumed. *Id.* at 468-474; see also *id.* at 468 (noting that revision preserved "original intent of Congress"). It is clear that Congress intended no substantive amendment to Section 29. To the contrary, the Reviser's Notes, which guide construction of any alterations made during the 1948 revision (see *id.* at 472-474), stipulate that only "[c]hanges * * * in phraseology" occurred in recodifying Section 29 as Section 495. H.R. Rep. No. 304, 80th Cong., 1st Sess. A42 (1947).

Yet in the process of recodification, Congress altered former Section 29 in the one way that the *Davis* Court had deemed determinative: it inserted

the critical reference ("such") into the third clause of the statute. The "false" writings covered by that provision are now explicitly identified with the "falsely made" writings of the first clause.[15] Thus, Congress effectively equated the "falsely made" writings "know[n] * * * to be false" in the Section's last clause.

It is inconsistent with the aims of the 1948 recodification to conclude that Congress intended to abandon without comment the long-standing interpretation that the "false" writings of Section 29 included those writings that were false in content as well as those that were false in execution. It is much more probable that Congress's action demonstrated that it did not attach the dominant common law interpretation to the phrase "falsely made." The Congress that reenacted both Section 495 and Section 2314 in 1948 evidently assumed that the phrase "falsely made" referred to writing "know[n] * * * to be false." See also *Davis*, 231 U.S. at 188 (third clause of Section 29 covers "any and all fraudulent documents, whether forged or not forged"). Moreover, Congress's action in 1948 strongly suggests that Congress did not have the common law definition in mind nine years earlier when it first added the term "falsely made" to the National Stolen Property Act.

[15] As reenacted, Section 495 provided (emphasis added):

> **Whoever falsely makes, alters, forges or counterfeits any * * * writing, for the purpose of obtaining * * * from** the United States * * * any sum of money; or
>
> **Whoever utters or publishes as true any such false, forged, altered, or counterfeited writing, * * * knowing the same to be false, altered, forged, or counterfeited; or**
>
> **Whoever transmits to, or presents at * * * [any federal officer or office], any *such* writing in support of, or in relation to, any account or claim, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited * * * [shall be guilty of a crime].**

More recently, Congress has provided an even more unambiguous indication that it understands the term "falsely made" in Section 2314 not to be restricted to the predominant common law meaning of the term. In 1984, Congress amended Section 2311, which defines "securities" for purposes of Section 2314, to include "[any] valid or blank motor vehicle title." Motor Vehicle Theft Law Enforcement Act of 1984, Pub. L. No. 98-547, § 202, 98 Stat. 2770. Because there can be no such thing as a "counterfeit, valid," or "altered, valid" motor vehicle title, Congress's reference to valid motor vehicle titles in Section 2311 clearly indicates that it regarded the term "falsely made" to include genuine documents that contained false information when they were made. Otherwise, the statute's application to a "valid" but "falsely made" motor vehicle title would make no sense.

The legislative history of the 1984 amendment confirms this reading of Congress's view of the statute. The amendment was aimed at the title fraud problem, analogous to the one presented here, that attends trafficking in stolen vehicles. It was passed as part of the Motor Vehicle Theft Law Enforcement Act of 1984, Pub. L. No. 98-547, § 202, 98 Stat. 2770, "a comprehensive package of proposals designed to curb the theft of motor vehicles by preventing thefts and decreasing the ease with which certain stolen vehicles and their major parts can be

fenced." H.R. Rep. No. 1087, 98th Cong., 2d Sess. Pt. 1, at 2 (1984).[16]

The 1984 amendment was enacted after Congress heard testimony concerning the inability of the States independently to control the circulation of title documents. That testimony detailed weaknesses in state verification of title documents, inspection of vehicles, and title document security measures; problems created by lack of uniformity in title documents; and gaps in state legal authority to monitor and control the titling process, for example, by investigating cars with altered vehicle identification numbers. In particular, the testimony exposed, within the context of the stolen car market, precisely the type of problem that was exploited by the scheme in this case.[17] According to a submission from the Department of Transportation, a common technique for retitling stolen vehicles involves the submission of title documents that have been altered by modifying

[16] See *Motor Vehicle Theft Law Enforcement Act of 1983: Hearing on S. 1400 Before the Senate Comm. on Commerce, Science, and Transportation*, 98th Cong., 1st Sess. 1 (1983) (discussing rise and increasing professionalization of auto theft); *Motor Vehicle Theft Law Enforcement Act: Hearing on H.R. 2235 Before the House Comm. on Energy and Commerce*, 98th Cong., 1st Sess. (1983) [hereinafter *House Hearing*], at 2-3, 4, 73 (same). The bill sought to give "law enforcement officials at all levels of government" the tools to "crack criminal theft rings" and "to apprehend, successfully prosecute and punish motor vehicle thieves." H.R. Rep. No. 1087, *supra*, Pt. 1, at 2-3.

[17] See, *e.g.*, *House Hearing* 52-53, 60; *Motor Vehicle Theft Prevention Act: Joint Hearings on H.R. 4178 Before the House Comm. on Interstate and Foreign Commerce and the House Comm. on Foreign Affairs*, 96th Cong., 2d Sess. 304-305, 306-331 (1980) [hereinafter *Joint Hearings*].

a vehicle identification number to match that of a stolen automobile.[18] As in petitioner's title washing scheme, false (but genuine) documents are obtained for the stolen vehicle on the basis of the fraudulently altered originals.[19]

The clear import of the legislative history of the 1984 amendment to Section 2314 is that Congress, in its effort to deter trafficking in stolen vehicles, sought to ensure that title washing schemes would be subject to federal prosecution.[20] In order for the 1984 amendment to have that effect, however, the term "falsely made" must be understood to apply to title documents that are "genuine" but, after completion of the washing process, contain key false information. If petitioner's narrow construction of the term

[18] See *Joint Hearings* 314-315, 316-317.

[19] The scheme also closely parallels the one that was the subject of the prosecution in *United States* v. *Daly*, *supra*. In that case, a car theft ring operating in California routinely altered the vehicle identification numbers of stolen vehicles, and sent counterfeited certificates with matching identification numbers to Nebraska. The state vehicle registration policy there did not require a car's presence in the State nor did it provide that a State in which a vehicle had been registered would be notified of the impending registration transfer. Nebraska thus issued "genuine" motor vehicle titles, which defendants were successfully prosecuted for transporting in interstate commerce. 716 F.2d at 1502-1503.

[20] Although the hearing testimony focused on title reforms necessary to deter traffic in stolen vehicles, Joan Claybrook of the National Traffic Highway Safety Administration identified "odometer rollback" as another area of fraud. She noted that "[t]he title is also quite important for notification of the odometer reading at the time of the exchange of title." *Joint Hearings* 304-305.

"falsely made" is adopted, Congress's clear purpose to outlaw title washing schemes would be defeated.

In sum, the available evidence suggests that Congress has not intended the term "falsely made" in Section 2314 to be used in its narrow common law sense. Rather, Congress has legislated in reliance on the assumption that the term encompasses documents that are "falsely made" because they are produced by officials who are duped by false information. To give the term the narrow meaning that the common law courts accorded it would defeat both the general purpose of Section 2314 and Congress's specific intention that the statute reach fraudulent conduct such as the scheme in this case.[21]

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[21] As we have noted above (see note 10, *supra*), the type of fraudulent inducement represented by the title washing scheme in this case was considered by some courts at common law to be forgery. Thus, in the event that this Court determines that Congress intended to adopt the restrictive common law meaning of "falsely made" as equivalent to "forged," Section 2314 would still apply to prohibit this type of forgery. That construction of the term "falsely made" would limit the incongruity between imputing liability to those who alter or forge a motor vehicle title, and those who obtain the same result by submitting false information to state officials issuing the title.

If the case is decided in this manner, it would require remand for a new trial, because the trial court in this case did not instruct the jury to consider whether petitioner had transported the titles with the knowledge that they had been obtained by fraudulently inducing their issuance on the basis of false information.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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JUNE 1990

☆ U. S. GOVERNMENT PRINTING OFFICE: 1990 262203 950